

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

AUG 30 2007

COURT OF APPEALS
DIVISION TWO

EDWARD S.,

Appellant,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY and
EDEN S.,

Appellees.

2 CA-JV 2007-0025

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17230000

Honorable Suzanna S. Cuneo, Judge Pro Tempore

AFFIRMED

Peter G. Schmerl

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Dawn R. Williams

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

V Á S Q U E Z, Judge.

¶1 Following a contested severance hearing, the juvenile court terminated the parental rights of appellant Edward S. to his two-year-old daughter, Eden S., on the grounds of mental illness, mental deficiency, and/or a history of chronic abuse of dangerous drugs, controlled substances, or alcohol, *see* A.R.S. § 8-533(B)(3), and out-of-home placement for both nine months and fifteen months, *see* § 8-533(B)(8)(a) and (b). Edward contends there was insufficient evidence to support the juvenile court’s order on any of these grounds. In particular, he maintains that, as of the date of the severance hearings, his mental status had improved significantly, negating the court’s finding that his mental illness was likely to continue for a prolonged and indeterminate period. Edward also contends his trial counsel had been ineffective because he failed to call a physician “or other members of Appellant’s mental health team to testify as to Appellant’s current mental health.” We affirm for the reasons stated below.

Facts and Procedural Background

¶2 In January 2005, the Arizona Department of Economic Security (ADES) filed a dependency petition alleging one-week-old Eden was dependent as to both her parents. The mother had been diagnosed as suffering from schizoaffective disorder, and hospital staff were concerned because the mother appeared unable to care for Eden, who was regarded as medically fragile because she was born with a heart-related defect. Edward was in a psychiatric facility at the time, clearly unable to care for Eden. The juvenile court adjudicated Eden dependent in June 2005 following a contested dependency hearing. After

a permanency hearing in late November, at which time Edward was an inpatient at the Arizona State Hospital (ASH), the court ordered that Eden was to remain in her placement with the mother's adult child, Eden's half sister, and changed the initial case plan goal of reunification to severance and adoption. The court relieved ADES of its responsibility to provide reunification services and appointed a guardian ad litem for both parents.

¶3 ADES filed a motion for termination of the parent-child relationship as to both parents in December 2005, and the court permitted ADES to file an amended petition in April 2006. The severance hearing was set for November. At the time set for the hearing, the court admitted a number of exhibits into evidence upon stipulation of the parties, but Edward requested a continuance of the hearing because he was still being treated at ASH. The hearing was continued until January. Edward filed a motion to continue the January hearing on the ground that he was "progressing" and, though no longer hospitalized, needed more time to "finish his psychological and psychiatric evaluation and to complete his therapeutic treatment." Although the juvenile court denied the motion and proceeded with the first day of the hearing, it set the next hearing date for March 19, 2007, and granted Edward until March 1 to "disclose any additional witnesses[,] including mental health professionals," and permitted him to present the telephonic testimony of any such health care professionals. Following additional testimony and information on March 19, the juvenile court terminated Edward's rights on all grounds alleged in the motion and the amended motion.

Standard of Review

¶4 We will not disturb an order terminating parental rights so long as there is reasonable evidence to support the factual findings upon which the order is based. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). If there is sufficient evidence to sustain the court's order on one statutory ground, we need not address the sufficiency of the evidence as to any other ground. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 3, 53 P.3d 203, 205 (App. 2002). “[W]e do not re-weigh the evidence on review.” *Id.* ¶ 12.

Discussion

¶5 Both in ruling from the bench on the third day of the severance hearing and in its minute entry of that date, the juvenile court made thorough factual findings relating to each of the grounds. The court found ADES had presented “clear and convincing evidence in support of the Court granting the motion for termination of parent-child relationship” on all three grounds ADES had alleged in its motion and amended motion. With respect to § 8-533(B)(3), the court found as follows:

The evidence is overwhelming that the father does have serious mental health issues and a diagnosis of mental illness; that he spent the majority of the time this case was open at Arizona State Hospital receiving inpatient mental health services; that according to his evaluating psychologist, Dr. Daniel Juliano, the father is not able to parent today and would not be able to parent in the foreseeable future given his lengthy history of mental health issues, multiple hospitalizations, and the lack of prognosis for positive change.

The court further found that ADES had provided a variety of services to Edward but he had not benefitted from those services because of the seriousness of his mental illness, nor was he likely to benefit from such services “in the future in order to get him to a place where he could safely parent any child.” Finally, the court found “clear and convincing evidence” that termination of Edward’s parental rights was in Eden’s best interests, noting her current placement was appropriate, she was being provided “exemplary care,” and the person caring for her demonstrated “a total commitment to continue to” provide such care.

¶6 As directed by the court, ADES prepared formal findings of fact and conclusions of law, which the court signed. The court found Edward was not able to “discharge his parental responsibilities because of mental illness, mental deficiency and/or a history of chronic abuse of dangerous drugs, controlled substances or alcohol, and there are reasonable grounds to believe that these conditions will continue for a prolonged indeterminate period.” The court also found as follows:

When the investigating case worker questioned the father about his drug use, he said he did not use drugs. When told his wife said he did, he responded that he and his wife suffered from identity theft and the caseworker “could not be sure she was really talking to his wife.” The father stated to the case worker that he worked for the State Department under President Reagan. He said he is not sure how the “government got into his brain” but they did and they screwed his brain up. Dr. Karl Gathof, [the] father’s psychiatrist, states “It is my diagnosis that the patient has a mental illness of such magnitude that as a parent or guardian it renders him incapable of benefitting from reunification services. [Edward] is diagnosed with Schizoaffective Disorder . . . the symptoms are treated with medications, it is a chronic condition with no prognosis of full

remission, and in many cases, as with [Edward], patients often have frequent and recurring relapses.”

¶7 These factual findings are amply supported by the record, which includes, inter alia, the report and testimony of psychologist Daniel Juliano, testimony of Child Protective Services caseworker Don Hauser,¹ and a variety of other records and reports. That the court noted Edward appeared to be doing better at the time of the hearing does not negate the court’s factual findings and its conclusion that severance was proper pursuant to § 8-533(B)(3).

¶8 The record established that Edward’s mental status fluctuated over time. Dr. Juliano stated in his report that Edward’s substance abuse and refusal to take prescribed medications exacerbated his condition. Juliano noted that Edward lacked insight into the gravity of his condition and opined that Edward would be “subject to episodic periods of mental disorder in the future.” Juliano testified that a child in Edward’s care would be at risk because Edward’s “mental resources” would be spent trying to manage himself. He stated that, although Edward’s condition was theoretically treatable, historically Edward had “required a number of interventions that have not had any sustainable success,” as evidenced by Edward’s failure to comply with the case plan and the directives of those treating him. For that reason, Juliano believes Edward’s mental illness “will continue for

¹Hauser had been Edward’s caseworker since January 2005 and had known Edward for about twenty years because Hauser had been a therapist at the Southern Arizona Mental Health Center where Edward had been a client.

the foreseeable future.” As Juliano stated in his report, Edward might have periods of stability, but his prognosis long-term is poor, and periods of stability will be followed by periods of “decomp[ensa]tion.”

¶9 Edward contends, though somewhat obliquely, that ADES neglected to make diligent reunification efforts by failing to give him sufficient time or opportunity to benefit from services it provided. And he complains that the caseworker testified he had not had contact with Edward for three-and-a-half months before he testified at the severance hearing.²

¶10 Edward is correct that, in *Mary Ellen C. v. Arizona Department of Economic Security*, 193 Ariz. 185, ¶¶ 32-34, 971 P.2d 1046, 1052-53 (App. 1999), Division One of this court held that, before a parent’s rights may be terminated on the ground of mental illness or deficiency, the state must provide the parent with appropriate reunification services. But the court also held that ADES need not provide such services if they would be futile; it is only obligated “to undertake measures with a reasonable prospect of success.” *Id.* ¶ 34.

¶11 The initial case plan goal was reunification. Edward was hospitalized when Eden was born, but the case plan included the requirement that he follow up with mental health treatment upon his release. He was offered numerous services, including a newborn-

²As ADES points out, this was an inaccurate paraphrasing of Hauser’s testimony. He testified on January 11, 2007, it had been about three weeks to a month since he had had contact with Edward, not three-and-a-half months.

care class, parenting classes, anger management treatment, a psychological evaluation, and random urinalysis. Edward refused to participate in urinalysis. He began to use illegal drugs and was readmitted to ASH in September 2005, remaining there through November. He was psychologically evaluated, but he did not provide proof that he had participated in any of the other services offered him. The juvenile court found any additional reunification efforts would be futile, relieving ADES of the responsibility to provide such services after the permanency hearing. The record supports its conclusion, which the court reiterated in the findings it entered after the severance hearing, noting that Edward's psychiatrist deemed such efforts futile.

¶12 Finally, we reject Edward's contention that his attorney was ineffective. Under either the standard applicable to criminal cases, *see Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985), or the standard recently articulated by Division One of this court in *Donald W., Sr. v. Arizona Department of Economic Security*, 215 Ariz. 199, ¶ 28, 159 P.3d 65, 73 (App. 2007), Edward has not sustained his burden. He has failed to establish either that counsel's performance was deficient and deprived Edward of a fair trial and a meaningful opportunity to be heard, *see Donald W.*, 215 Ariz. 199, ¶ 28, 159 P.3d at 73, or that counsel's purportedly deficient performance was so prejudicial that it changed the outcome of the case, *see Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

¶13 That Edward required prolonged and repeated hospitalization was not within counsel's control. Counsel sought a continuance of the termination hearing, and his first request in January was granted. Although the court refused to grant a second postponement, it gave counsel an opportunity to look into and present any additional evidence when the hearing resumed in March. The record shows counsel chose not to call Edward's treating psychiatrist to testify after having interviewed her. We infer that counsel made this tactical decision after concluding such testimony would not have been favorable. Counsel cross-examined ADES's witnesses and provided a defense to ADES's motion and amended motion for termination that was reasonable under the circumstances, which included Edward's decision not to testify on his own behalf. We will not second-guess counsel's tactical decisions so long as they appear to have a reasonable basis, which they do here. *See Nash*, 143 Ariz. at 398, 694 P.2d at 228.

¶14 The juvenile court's order terminating Edward's parental rights to Eden is affirmed.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge